No. 437

FILED
OCT 2 1942
CHARLES ELMORE CROPLEY
CLERK

In The Supreme Court of the United States

APPEAL FROM THE SUPREME COURT OF OHIO

No. 29,145

AND

FROM THE COURT OF APPEALS, EIGHTH JUDICIAL DISTRICT OF OHIO.

No. 16,655

STATE OF OHIO, ex rel S. H. SQUIRE, SUPT. OF BANKS IN CHARGE OF LIQUIDATION OF THE UNION TRUST COMPANY, SUB. PLFF. UNION PROPERTIES, INC.,

Plaintiffs,

vs.

ROBERT W. HALLIDAY, ET AL.,

Defendants.

PETITION AND BRIEF FOR WRIT OF CERTIORARI IN THE SUPREME COURT OF OHIO AND TO THE COURT OF APPEALS, EIGHTH JUDICIAL DISTRICT OF OHIO.

JAMES BRAVO,
WM. T. ARNOS,
R. W. HALLIDAY,
Leader Building, Cleveland, Ohio,
Attorneys for Petitioner.

EDWIN H. CHANEY,
WILLIAM C. HARTMAN,
Union Commerce Bldg., Cleveland, Ohio,
Attorneys for Plaintiffs.

SUPREME COURT OF THE UNITED STATES

TERM, 1942

No. ——

STATE OF OHIO, ex rel S. H. SQUIRE, SUPT. OF BANKS IN CHARGE OF LIQUIDATION OF THE UNION TRUST COMPANY, SUB. PLFF. UNION PROPERTIES, INC.,

Plaintiffs,

vs.

ROBERT W. HALLIDAY, ET AL.,

Defendants.

PETITION AND BRIEF FOR WRIT OF CERTIORARI IN THE SUPREME COURT OF OHIO AND TO THE COURT OF APPEALS, EIGHTH JUDICIAL DISTRICT OF OHIO.

To the Honorable Justices of The Supreme Court of The United States:

Now comes Robert W. Halliday, resident of Cleveland, Ohio, Petitioner herein, and says:

On the 17th day of March, 1938, The Court of Appeals, 8th Judicial District of Ohio entered a decree in foreclosure of a mortgage upon the following described premises:

Parcel No. 1: Situated in the City of Cleveland, County of Cuyahoga and State of Ohio, and known as being Sub Lots Nos. 9 and 10 in Olive A. Meech's Subdivision of part of Original One Hundred Acre Lot No. 457, as shown by the recorded plat of said Subdivision in Volume 4 of Maps, Page 24 of Cuyahoga County Records, excepting therefrom 43 feet from front to rear of the Easterly side of said Sublot No. 10.

Parcel No. 2: Also Sub Lots Nos. 7 and 8 in the Olive A. Meech's Subdivision of part of Original One Hundred Acre Lot No. 457, as shown by the recorded plat of said Subdivision in Volume 4 of Maps, Page 24 of Cuyahoga County Records, and bounded and described as follows:

Beginning on the Southerly line of Richmond Avenue S. E., (formerly Richmond Street), at the Northeasterly corner of land conveyed by Frank L. Crobaugh and wife, to Catherine Hermann, by deed dated June 12, 1905, and recorded in Volume 979, Page 112 of Cuyahoga County Records; thence Easterly along said Southerly line of Richmond Avenue S. E., about 128.85 feet to the Northeasterly corner of said Sub Lot No. 8; thence Southerly along the Easterly line of said Sub Lot No. 8, 152.625 feet to the Southeasterly corner of said Sub Lot No. 8; thence Westerly along the Southerly line of said Sub Lot No. 8, 16 feet to the most Easterly corner of a triangular parcel of land conveyed by Olive A. Meech, a feme sole, to The Connotton Valley Railway Company, by deed dated August 19, 1881, and recorded in Volume 328, Page 81 of Cuyahoga County Records; thence Northwesterly along the Northeasterly line of land so conveyed to The Connotton Valley Railway Company, to the Southeasterly corner of land conveyed to Catherine Hermann, as aforesaid; thence Northerly along the Easterly line of land conveyed to Catherine Hermann, as aforesaid, about 164.375 feet to the place of beginning, as appears by said plat.

In case No. 16655 on the 17th day of May, 1938, the Sheriff of Cuyahoga County sold said premises to The Union Properties, Inc., at two-thirds of the appraisal and on the 10th day of JANUARY 1939, said Court of Appeals confirmed the sale of said premises by the Sheriff of Cuyahoga County to The Union Properties, Inc., which corporation had been substituted in said foreclosure proceedings as the plaintiff, prior to the time of said Sheriff's sale.

On the 23rd day of December, 1938, and prior to the date of confirmation of said sale, your petitioner filed objections in the Court of Appeals opposing confirmation of said sale on the ground that the Sheriff's appraisal was too low and upon no other ground.

Thereafter your petitioner discovered that some of said appraisers were not freeholders of Cuyahoga County, Ohio, and had not actually viewed the premises to be appraised and that some of said appraisers were not disinterested parties but had pecuniary interests in The Union Properties, Inc., and also discovered that one of the Judges of the said Court of Appeals had at the time of Judgment and confirmation of sale substantial pecuniary interests in and economic arrangements with The Union Properties, Inc., and its predecessors in title.

Promptly after becoming aware of the aforesaid circumstances your Petitioner filed a petition in said Court of Appeals in said case No. 16655 to set aside said Sheriff's Sale and said confirmation of said sale for the reason that said appraisal and said sale were void and subsequently filed a supplementary petition to set the decree of foreclosure aside on the ground that one of the Judges of said Court of Appeals had, at the time said decree was entered, substantial pecuniary interests in and economic arrangements with said The Union Properties, Inc., and its predecessors in title.

On the day of December, 1941, said Court

of Appeals issued an order to take depositions of sundry witnesses.

That said depositions were subsequently duly taken and that on the 2nd day of March, 1942, said cause came on for hearing before said Court of Appeals and said depositions were presented and delivered to said Court, the pertinent part of which appears in Defendant's Exhibit Z and attached to the within petition and made a part hereof.

On said 2nd day of March, 1942, in said Court of Appeals at the hearing of said pending cause one John Crowl, a qualified court reporter, took shorthand notes of said proceedings. A pertinent part of said proceedings, as appears from transcription of said shorthand notes, discloses that two of the Judges of said Court of Appeals had substantial pecuniary interests in The Union Properties, Inc., and its predecessors in title, on the aforesaid 17th day of March, 1938, when said Court of Appeals rendered said Judgment and decree in foreclosure and on aforesaid 10th day of JANUARY 1939, when said Court of Appeals confirmed said Sheriff's sale to said The Union Properties, Inc.

Said Court of Appeals rendered Judgment against your Petitioner and dismissed his petition to vacate said sale and said confirmation of sale and dismissed his supplemental petition to vacate and set aside said decree of foreclosure and made an entry of said Judgment in the court journal on the 16th day of March, 1942. Said Judgment is embodied in the following words:

> "Prayer of petition and supplemental petition for vacation of judgment denied. Exceptions noted. Petitions are dismissed. Exceptions noted."—*Journal 14, 473.*

Thereafter on the 3rd day of April, 1942, your Peti-

tioner filed with said Court of Appeals and with the Supreme Court of Ohio a Notice of Appeal as of Right to the Supreme Court of Ohio, from said Judgment, in accordance with the rules and law of Ohio Appellate procedure, and subsequently filed a Motion to Certify.

On the 3rd day of June, 1942, the Supreme Court of Ohio rendered final Judgment in said cause and overruled said Motion to Certify and denied to your Petitioner the Appeal of Right and entered said Judgment on the 3rd day of June, 1942, in the following language:

> "Motion for an order directing the Court of Appeals to Certify its Record. It is ordered by the Court that this motion be, and the same hereby is overruled. Appeal of Right dismissed for the reason no debatable constitutional question is involved in said cause."—*Journal 14, page 603.*

Your Petitioner contended in his Briefs filed in said Court of Appeals, the Court of first instance, that, in the prior actions he had been deprived of property without due process of law contrary to Amendment XIV, Section 1 of the Constitution of the United States, and alleged the same in his pleadings filed in said Court of Appeals, and your Petitioner made the same contention before the Supreme Court of Ohio.

WHEREFORE your Petitioner respectfully prays that a Writ of Certiorari be issued by this Honorable Court to command the Supreme Court of Ohio to certify and to send to this Court for review and determination a transcript of the record in case numbered 29,145 on its Docket and a transcript of the record and proceedings in case numbered 16655 on the Docket of said Court of Appeals and that the Judgment of the Supreme Court of Ohio may be reversed by this Honorable Court, and that an Order may be issued directing the Supreme Court of Ohio to grant to your Petitioner a hearing on MERIT.

BRIEF SUPPORTING PETITION FOR WRIT

Robert W. Halliday, sole heir-at-law of Janet M. Halliday, deceased, submits the following brief to support his Petition for a Writ filed herewith in the above entitled case.

The pending case was originally commenced by the petitioner in the Court of Appeals, 8th Judicial District of Ohio, by filing a petition to vacate an order of said Court of Appeals confirming the sale of real property by the Sheriff of Cuyahoga County, Ohio, to The Union Properties, Inc., the plaintiff in foreclosure case No. 16655, on the grounds that there was irregularity in the obtaining of said order in that the appraisers were not disinterested and were not freeholders of Cuyahoga County, and that said purported appraisers did not return an estimate of the real value of the property in money but did return an estimate of value of said property far below its real value in money, and that there was not an appraisement of the property as required by the Laws of the State of Ohio. Specifically Section 11672 of the General Code of Ohio provides:

> "11672. Lands to be appraised.—When execution is levied upon lands and tenements, the officer who makes the levy shall call an inquest of three disinterested freeholders, residents of the county where the lands taken in execution are situated, and administer to them an oath impartially to appraise the property so levied upon, upon actual view. They forthwith shall return to such officer, under their hands, an estimate of the real value of the property in money."

Defendant's Exhibit 1 (R) is a photostatic copy of the return of the appraisers in said case No. 16655.

The testimony of T. L. Terrell (R-) one of the appraisers shows that he was not a disinterested freeholder.

The testimony of C. E. Gould (R-) shows that he was not a freeholder of Cuyahoga County.

The testimony of V. M. DeMelto (R-) shows that he had substantial pecuniary interests with the Liquidator of Ohio State Banks, the predecessor of The Union Properties, Inc.

The testimony of Mark Swisher (R-) shows that the return of the appraisers was not an estimate of the real value of the property in money.

The testimony of Peter V. Shepherd (R-) shows that the return of the appraisers was not an estimate of the real value of the property in money.

The testimony of both Hugh K. Dawson (R-) and R. W. Davis (R-) shows that The Union Properties, Inc., and the insurance companies after an inspection by the engineers of the insurance companies agreed on a valuation of the super-structure of $44,444.00 and accordingly entered into 90% co-insurance contracts for fire insurance in the amount of $40,000.00 on the superstructure alone promptly after the Sheriff conveyed the said described premises.

The testimony of Lewis F. Chapman (R-) shows that the superstructure of said described premises was totally destroyed by fire on June 23, 1941.

Said Petitioner also filed in said Court of Appeals in the pending case a Supplemental Petition to vacate the decree of foreclosure and the order to appraise, advertise and sell the premises, rendered on the 17th day of March, 1938, on the ground that one of the Judges of said Court of Appeals had substantial pecuniary interest in and economic arrangements with The Union Properties, Inc., and its predecessor and at the hearing of said case before the said Court of Appeals on March 2, 1942, it was disclosed that two of the Judges of said Court of Appeals had substantial pecuniary interests in The Union Properties, Inc. To substantiate the above, reference is made to the court reporter's notes taken in Court of Appeals, at the hearing of the pending cause on said March 2, 1942, to-wit:

Mr. Bravo: So much for the appraisers—except that I want to comment upon Thos. Terrell. He is a brother of former Judge Terrell, who sat on this bench.

He stated in his deposition that he did not know whether any members of his family were financially interested in The Union Trust Co. or its successors. Well, the records of that bank, I think, will disclose that the sisters of Judge and Thos. Terrell are holders of creditor's notes against the Union Properties, Inc., in some Three Thousand Dollars or better and Judge Terrell heavily interested.

Judge Lieghley: So you have not overlooked anything—

Mr. Bravo: Well, we want time to take their depositions.

Judge Lieghley: I am a depositor in that bank; so I do not want you to overlook that.

Mr. Bravo: Well, your Honor, I think that revelation comes at a rather late time.

Judge Lieghley: If that is disqualification, neither of the banks could probably get a case tried in Cuyahoga County.

Mr. Bravo: Well, they can always bring a Judge from outside the county unless your Honor revealed his interest by reason of the deposit, and there was an agreement that your Honor sit in this matter.

Judge Lieghley: Just simply a depositor. When they closed the bank I did get my money, a few cents.

Mr. Bravo: Your Honor, for the record I desire to show that Robert W. Halliday objects to your Honor sitting in this case, by reason of the fact that you have just disclosed that you were a depositor in the Union Trust Company an as a holder of creditor's notes in Union Properties, Inc.

Judge Lieghley: Let the record so show. I think I have something around $400 coming yet. Show that, too.

Mr. Bravo: Subject to same objection.

If a Judge has pecuniary interests in the result of the judgment which he renders, such judgment is invalid.

In the case of *Gregory vs. C. C. C. R. R. Co.,* 4 O. S. 675, it was held:

> "Where two judges of the Court of Common Pleas are interested in the event of a proceeding to appropriate land to the use of a railroad and that fact appears of record, and there is no evidence that the land-holder waived his objections to the court, the order of the court, appointing appraisers and directing a warrant, will be revised."

Here Judges were stockholders of the railroad. The appraisers appointed by the court set the value of the land taken and benefited thereby.

In the case of *Tumey vs. State of Ohio,* 273 U. S. Rep. 510-11, the United States Supreme Court held that the interest of a mayor in the result of his decision resulted in an invalid judgment.

In the Tari case, 117 O. S. at page 486, Chief Justice Marshall says:

> "While a State can fix, determine and define the jurisdiction of its courts, it is still open to the United States Supreme Court to determine whether a jurisdiction so exercised operates as a denial of due process of law."

Violation of the due process clause of Amendment XIV of the Constitution of the United States was alleged in the petition originally filed in said Court of Appeals by the petitioner.

Section 6 of Art. IV of the Ohio State Constitution provides that the judgments of the Court of Appeals of the State of Ohio shall be final in all cases, except cases involving questions arising under the Constitution of the United States or of the State of Ohio, and except in cases of which a *Court of Appeals* of Ohio has *Original Jurisdiction.*

In the pending case the petition to vacate the prior action of the Court of Appeals was filed in the Court of Appeals. Original Jurisdiction was assumed by said Court of Appeals. No contention against such *Original Jurisdiction* has been made.

The proir Action of the said Court of Appeals which the Petitioner seeks to vacate consist of

1. A decree in foreclosure and orders to appraise, advertise and sell the described premises rendered on March 17, 1938 by said Court of Appeals;

2. The sale of said described premises by the sheriff of Cuyahoga County pursuant to said orders of March 17, 1938;

3. The order of confirmation of sale by said Court of Appeals issued JANUARY 10TH, 1939.

The Supreme Court of Ohio ignored the provisions of Art. IV, Section 6 of the Ohio State Constitution, and denied to your Petitioner the right to a hearing on the merits of the case and affirmed the judgment of said Court of Appeals without a hearing on merit in violation of said Art. IV, Section 6 of the Ohio State Constitution, and in violation of Amendment XIV, Section 1, of the United States Constitution.

JAMES BRAVO, WM. T. ARNOS, R. W. HALLIDAY,
Attorneys for Petitioner,
1245 Leader Building,
Cleveland, Ohio.

STATE OF OHIO,
CUYAHOGA COUNTY, } ss:

ROBERT W. HALLIDAY, being first duly sworn, says: I am the foregoing Petitioner, and that the foregoing Petition is true to my own knowledge.

SWORN to before me this ..... day of August, 1941.

Notary Public.

No. 438

FILED
OCT 2 1942
CHARLES ELMORE CROPLEY
CLERK

In The Supreme Court of the United States

APPEAL FROM THE SUPREM COURT OF OHIO

No. 29,146

AND

FROM THE COURT OF APPEALS, EIGHTH JUDICIAL DISTRICT OF OHIO.

No. 16,656

STATE OF OHIO, ex rel S. H. SQUIRE, SUPT. OF BANKS IN CHARGE OF LIQUIDATION OF THE UNION TRUST COMPANY, SUB. PLFF. UNION PROPERTIES, INC.,

Plaintiffs,

vs.

ROBERT W. HALLIDAY, ET AL.,

Defendants.

PETITION AND BRIEF FOR WRIT OF CERTIORARI IN THE SUPREME COURT OF OHIO AND TO THE COURT OF APPEALS, EIGHTH JUDICIAL DISTRICT OF OHIO.

JAMES BRAVO,
WM. T. ARNOS,
R. W. HALLIDAY,
Leader Building, Cleveland, Ohio,
Attorneys for Petitioner.

EDWIN H. CHANEY,
WILLIAM C. HARTMAN,
Union Commerce Bldg., Cleveland, Ohio,
Attorneys for Plaintiffs.

SUPREME COURT OF THE UNITED STATES

TERM, 1942

No. ——

STATE OF OHIO, ex rel S. H. SQUIRE, SUPT. OF BANKS IN CHARGE OF LIQUIDATION OF THE UNION TRUST COMPANY, SUB. PLFF. UNION PROPERTIES, INC.,

Plaintiffs,

vs.

ROBERT W. HALLIDAY, ET AL.,

Defendants.

PETITION AND BRIEF FOR WRIT OF CERTIORARI IN THE SUPREME COURT OF OHIO AND TO THE COURT OF APPEALS, EIGHTH JUDICIAL DISTRICT OF OHIO.

To the Honorable Justices of The Supreme Court of The United States:

Now comes Robert W. Halliday, resident of Cleveland, Ohio, Petitioner herein, and says:

On the 17th day of March, 1938, The Court of Appeals, 8th Judicial District of Ohio entered a decree in foreclosure of a mortgage upon the following described premises:

Situated in the City of Cleveland, County of Cuyahoga and State of Ohio, and known as being Sub Lots Nos. 11, 12, 13, and 14 in the Olive A. Meech Subdivision of part of Original One Hundred Acre Lot No. 457, as shown by the recorded plat of said Subdivision in Volume 4 of Maps, Page 24 of Cuyahoga County Records.

Said Sub Lots Nos. 11, 12, 13 and 14 together form a parcel of land having a frontage of 264 feet on the southerly side of Richmond Avenue, S. E. (20 feet wide), and extending back 111.375 feet on the Easterly line, 140.25 feet on the Westerly line, and having a real line of 264 feet, as appears by said plat, be the same more or less, but subject to all legal highways.

In case No. 16656 on the 27th day of May, 1938, the Sheriff of Cuyahoga County sold said premises to The Union Properties, Inc., at two-thirds of the appraisal and on the 10th day of JANUARY 1939, said Court of Appeals confirmed the sale of said premises by the Sheriff of Cuyahoga County to The Union Properties, Inc., which corporation had been substituted in said foreclosure proceedings as the plaintiff, prior to the time of said Sheriff's sale.

On the 23rd day of December, 1938, and prior to the date of confirmation of said sale, your petitioner filed objections in the Court of Appeals opposing confirmation of said sale on the ground that the Sheriff's appraisal was too low and upon no other ground.

Thereafter your petitioner discovered that some of said appraisers were not freeholders of Cuyahoga County, Ohio, and had not actually viewed the premises to be appraised and that some of said appraisers were not disinterested parties but had pecuniary interests in The Union Properties, Inc., and also discovered that one of the Judges of the said Court of Appeals had at the time of Judgment and confirmation of sale substantial pecuniary interests in and economic arrangements with The Union Properties, Inc., and its predecessors in title.

Promptly after becoming aware of the aforesaid circumstances your Petitioner filed a petition in said Court of Appeals in said case No. 16656 to set aside said Sheriff's Sale and said confirmation of said sale for the reason that said appraisal and said sale were void and subsequently filed a supplementary petition to set the decree of foreclosure aside on the ground that one of the Judges of said Court of Appeals had, at the time said decree was entered, substantial pecuniary interests in and economic arrangements with said The Union Properties, Inc., and its predecessors in title.

On the day of December, 1941, said Court

of Appeals issued an order to take depositions of sundry witnesses.

That said depositions were subsequently duly taken and that on the 2nd day of March, 1942, said cause came on for hearing before said Court of Appeals and said depositions were presented and delivered to said Court, the pertinent part of which appears in Defendant's Exhibit Z and attached to the within petition and made a part hereof.

On said 2nd day of March, 1942, in said Court of Appeals at the hearing of said pending cause one John Crowl, a qualified court reporter, took shorthand notes of said proceedings. A pertinent part of said proceedings, as appears from transcription of said shorthand notes, discloses that two of the Judges of said Court of Appeals had substantial pecuniary interests in The Union Properties, Inc., and its predecessors in title, on the aforesaid 17th day of March, 1938, when said Court of Appeals rendered said Judgment and decree in foreclosure and on aforesaid 10th day of 1939, when said Court of Appeals confirmed said Sheriff's sale to said The Union Properties, Inc.

Said Court of Appeals rendered Judgment against your Petitioner and dismissed his petition to vacate said sale and said confirmation of sale and dismissed his supplemental petition to vacate and set aside said decree of foreclosure and made an entry of said Judgment in the court journal on the 16th day of March, 1942. Said Judgment is embodied in the following words:

> "Prayer of petition and supplemental petition for vacation of judgment denied. Exceptions noted. Petitions are dismissed. Exceptions noted."—*Journal 14, 473.*

Thereafter on the 3rd day of April, 1942, your Peti-

tioner filed with said Court of Appeals and with the Supreme Court of Ohio a Notice of Appeal as of Right to the Supreme Court of Ohio, from said Judgment, in accordance with the rules and law of Ohio Appellate procedure, and subsequently filed a Motion to Certify.

On the 3rd day of June, 1942, the Supreme Court of Ohio rendered final Judgment in said cause and overruled said Motion to Certify and denied to your Petitioner the Appeal of Right and entered said Judgment on the 3rd day of June, 1942, in the following language:

> "Motion for an order directing the Court of Appeals to Certify its Record. It is ordered by the Court that this motion be, and the same hereby is overruled. Appeal of Right dismissed for the reason no debatable constitutional question is involved in said cause."—*Journal 14, page 604.*

Your Petitioner contended in his Briefs filed in said Court of Appeals, the Court of first instance, that, in the prior actions he had been deprived of property without due process of law contrary to Amendment XIV, Section 1 of the Constitution of the United States, and alleged the same in his pleadings filed in said Court of Appeals, and your Petitioner made the same contention before the Supreme Court of Ohio.

WHEREFORE your Petitioner respectfully prays that a Writ of Certiorari be issued by this Honorable Court to command the Supreme Court of Ohio to certify and to send to this Court for review and determination a transcript of the record in case numbered 29,145 on its Docket and a transcript of the record and proceedings in case numbered 16655 on the Docket of said Court of Appeals and that the Judgment of the Supreme Court of Ohio may be reversed by this Honorable Court, and that an Order may be issued directing the Supreme Court of Ohio to grant to your Petitioner a hearing on MERIT.

BRIEF SUPPORTING PETITION FOR WRIT

Robert W. Halliday, sole heir-at-law of Janet M. Halliday, deceased, submits the following brief to support his Petition for a Writ filed herewith in the above entitled case.

The pending case was originally commenced by the petitioner in the Court of Appeals, 8th Judicial District of Ohio, by filing a petition to vacate an order of said Court of Appeals confirming the sale of real property by the Sheriff of Cuyahoga County, Ohio, to The Union Properties, Inc., the plaintiff in foreclosure case No. 166566, on the grounds that there was irregularity in the obtaining of said order in that the appraisers were not disinterested and were not freeholders of Cuyahoga County, and that said purported appraisers did not return an estimate of the real value of the property in money but did return an estimate of value of said property far below its real value in money, and that there was not an appraisement of the property as required by the Laws of the State of Ohio. Specifically Section 11672 of the General Code of Ohio provides:

> "11672. Lands to be appraised.—When execution is levied upon lands and tenements, the officer who makes the levy shall call an inquest of three disinterested freeholders, residents of the county where the lands taken in execution are situated, and administer to them an oath impartially to appraise the property so levied upon, upon actual view. They forthwith shall return to such officer, under their hands, an estimate of the real value of the property in money."

Defendant's Exhibit 1 (R) is a photostatic copy of the return of the appraisers in said Case No. 16656.

The testimony of Birdie, A. K. A. Bridget, Carlin (R) shows that she was not a freeholder of Cuyahoga County and that she did not view nor inspect the property and that she had substantial pecuniary interests with the Liquidator of Ohio State Banks.

The testimony of Henry C. Peters (R) shows that he had substantial pecuniary interests with the Liquidator of Ohio State Banks, a predecessor of The Union Properties, Inc.

The testimony of Louis K. Sitko (R) shows that he was not a disinterested freeholder, being owner of certificates for creditor's notes of Union Properties, Inc., in one lot of $5454.54 and a further lot of $1454.54.

The testimony of Mark Swisher (R) shows that the return of the appraisers was not an estimate of the real value of the property in money.

The testimony of Peter V. Shepherd (R) shows that the return of the appraisers was not an estimate of the real value of the property in money.

Said Petitioner also filed in said Court of Appeals in the pending case a Supplemental Petition to vacate the decree of foreclosure and the order to appraise, advertise and sell the premises, rendered on the 17th day of March, 1938, on the ground that one of the Judges of said Court of Appeals had substantial pecuniary interest in and economic arrangements with The Union Properties, Inc., and its predecessor and at the hearing of said case before the said Court of Appeals on March 2, 1942, it was disclosed that two of the Judges of said Court of Appeals had substantial pecuniary interests in The Union Properties, Inc. To substantiate the above, reference is made to the court reporter's notes taken in Court of Appeals, at the hearing of the pending cause on said March 2, 1942, to-wit:

Mr. Bravo: So much for the appraisers—except that I want to comment upon Thos. Terrell. He is a brother of former Judge Terrell, who sat on this bench.

He stated in his deposition that he did not know whether any members of his family were financially interested in The Union Trust Co. or its successors. Well, the records of that bank, I think, will disclose that the sisters of Judge and Thos. Terrell are holders of creditor's notes against the Union Properties, Inc., in some Three Thousand Dollars or better and Judge Terrell heavily interested.

Judge Lieghley: So you have not overlooked anything—

Mr. Bravo: Well, we want time to take their depositions.

Judge Lieghley: I am a depositor in that bank; so I do not want you to overlook that.

Mr. Bravo: Well, your Honor, I think that revelation comes at a rather late time.

Judge Lieghley: If that is disqualification, neither of the banks could probably get a case tried in Cuyahoga County.

Mr. Bravo: Well, they can always bring a Judge from outside the county unless your Honor revealed his interest by reason of the deposit, and there was an agreement that your Honor sit in this matter.

Judge Lieghley: Just simply a depositor. When they closed the bank I did get my money, a few cents.

Mr. Bravo: Your Honor, for the record I desire to show that Robert W. Halliday objects to your Honor sitting in this case, by reason of the fact that you have just disclosed that you were a depositor in the Union Trust Company an as a holder of creditor's notes in Union Properties, Inc.

Judge Lieghley: Let the record so show. I think I have something around $400 coming yet. Show that, too.

Mr. Bravo: Subject to same objection.

If a Judge has pecuniary interests in the result of the judgment which he renders, such judgment is invalid.

In the case of *Gregory vs. C. C. C. R. R. Co.,* 4 O. S. 675, it was held:

> "Where two judges of the Court of Common Pleas are interested in the event of a proceeding to appropriate land to the use of a railroad and that fact appears of record, and there is no evidence that the land-holder waived his objections to the court, the order of the court, appointing appraisers and directing a warrant, will be revised."

Here Judges were stockholders of the railroad. The appraisers appointed by the court set the value of the land taken and benefited thereby.

In the case of *Tumey vs. State of Ohio,* 273 U. S. Rep. 510-11, the United States Supreme Court held that the interest of a mayor in the result of his decision resulted in an invalid judgment.

In the Tari case, 117 O. S. at page 486, Chief Justice Marshall says:

> "While a State can fix, determine and define the jurisdiction of its courts, it is still open to the United States Supreme Court to determine whether a jurisdiction so exercised operates as a denial of due process of law."

Violation of the due process clause of Amendment XIV of the Constitution of the United States was alleged in the petition originally filed in said Court of Appeals by the petitioner.

Section 6 of Art. IV of the Ohio State Constitution provides that the judgments of the Court of Appeals of the State of Ohio shall be final in all cases, except cases involving questions arising under the Constitution of the United States or of the State of Ohio, and except in cases of which a *Court of Appeals* of Ohio has *Original Jurisdiction.*

In the pending case the petition to vacate the prior action of the Court of Appeals was filed in the Court of Appeals. Original Jurisdiction was assumed by said Court of Appeals. No contention against such *Original Jurisdiction* has been made.

The proir Action of the said Court of Appeals which the Petitioner seeks to vacate consist of

1. A decree in foreclosure and orders to appraise, advertise and sell the described premises rendered on March 17, 1938 by said Court of Appeals;

2. The sale of said described premises by the sheriff of Cuyahoga County pursuant to said orders of March 17, 1938;

3. The order of confirmation of sale by said Court of Appeals issued , 1939.

The Supreme Court of Ohio ignored the provisions of Art. IV, Section 6 of the Ohio State Constitution, and denied to your Petitioner the right to a hearing on the merits of the case and affirmed the judgment of said Court of Appeals without a hearing on merit in violation of said Art. IV, Section 6 of the Ohio State Constitution, and in violation of Amendment XIV, Section 1, of the United States Constitution.

JAMES BRAVO, WM. T. ARNOS, R. W. HALLIDAY,
Attorneys for Petitioner,
1245 Leader Building,
Cleveland, Ohio.

STATE OF OHIO,
CUYAHOGA COUNTY, } ss:

ROBERT W. HALLIDAY, being first duly sworn, says: I am the foregoing Petitioner, and that the foregoing Petition is true to my own knowledge.

SWORN to before me this ..... day of August, 1942.

Notary Public.

Office - Supreme Court, U. S.
FILED
OCT 2 1942
CHARLES ELMORE CROPLEY
CLERK

No. 439

In The Supreme Court of the United States

APPEAL FROM THE SUPREM COURT OF OHIO

No. 29,14[illegible]

AND

FROM THE COURT OF APPEALS, EIGHTH JUDICIAL DISTRICT OF OHIO.

No. 16,65[illegible]

STATE OF OHIO, ex rel S. H. SQUIRE, SUPT. OF BANKS IN CHARGE OF LIQUIDATION OF THE UNION TRUST COMPANY, SUB. PLFF. UNION PROPERTIES, INC.,

Plaintiffs,

vs.

ROBERT W. HALLIDAY, ET AL.,

Defendants.

PETITION AND BRIEF FOR WRIT OF CERTIORARI IN THE SUPREME COURT OF OHIO AND TO THE COURT OF APPEALS, EIGHTH JUDICIAL DISTRICT OF OHIO.

JAMES BRAVO,
WM. T. ARNOS,
R. W. HALLIDAY,
Leader Building, Cleveland, Ohio,
Attorneys for Petitioner.

EDWIN H. CHANEY,
WILLIAM C. HARTMAN,
Union Commerce Bldg., Cleveland, Ohio,
Attorneys for Plaintiffs.

SUPREME COURT OF THE UNITED STATES

TERM, 1942

No. ——

STATE OF OHIO, ex rel S. H. SQUIRE, SUPT. OF BANKS IN CHARGE OF LIQUIDATION OF THE UNION TRUST COMPANY, SUB. PLFF. UNION PROPERTIES, INC.,

Plaintiffs,

vs.

ROBERT W. HALLIDAY, ET AL.,

Defendants.

PETITION AND BRIEF FOR WRIT OF CERTIORARI IN THE SUPREME COURT OF OHIO AND TO THE COURT OF APPEALS, EIGHTH JUDICIAL DISTRICT OF OHIO.

To the Honorable Justices of The Supreme Court of The United States:

Now comes Robert W. Halliday, resident of Cleveland, Ohio, Petitioner herein, and says:

On the 17th day of March, 1938, The Court of Appeals, 8th Judicial District of Ohio entered a decree in foreclosure of a mortgage upon the following described premises:

Situated in the City of Cleveland, County of Cuyahoga and State of Ohio, and known as being Sub Lots Nos. 65, 66, 67, 68, 69, 70, 71, 72 and 73 in Feusier, Gillette, Stafford and Dobb's Subdivision of part of Original One Hundred Acre Lot No. 447, as shown by the recorded plat of said Subdivision in Volume 8 of Maps, Page 10 of Cuyahoga County Records.

Said Sub Lots Nos. 65, 66, 67, 68, 69, 70, 71, 72 and 73, each has a frontage of 40 feet on the Easterly side of East 82nd Street, (formerly Stafford Street), as appears by said plat, be the same more or less, but subject to all legal highways.

In case No. 16657 on the 17th day of May, 1938, the Sheriff of Cuyahoga County sold said premises to The Union Properties, Inc., at two-thirds of the appraisal and on the 6th day of MARCH 1939, said Court of Appeals confirmed the sale of said premises by the Sheriff of Cuyahoga County to The Union Properties, Inc., which corporation had been substituted in said foreclosure proceedings as the plaintiff, prior to the time of said Sheriff's sale.

On the 23rd day of December, 1938, and prior to the date of confirmation of said sale, your petitioner filed objections in the Court of Appeals opposing confirmation of said sale on the ground that the Sheriff's appraisal was too low and upon no other ground.

Thereafter your petitioner discovered that some of said appraisers were not freeholders of Cuyahoga County, Ohio, and had not actually viewed the premises to be appraised and that some of said appraisers were not disinterested parties but had pecuniary interests in The Union Properties, Inc., and also discovered that one of the Judges of the said Court of Appeals had at the time of Judgment and confirmation of sale substantial pecuniary interests in and economic arrangements with The Union Properties, Inc., and its predecessors in title.

Promptly after becoming aware of the aforesaid circumstances your Petitioner filed a petition in said Court of Appeals in said case No. 16657 to set aside said Sheriff's Sale and said confirmation of said sale for the reason that said appraisal and said sale were void and subsequently filed a supplementary petition to set the decree of foreclosure aside on the ground that one of the Judges of said Court of Appeals had, at the time said decree was entered, substantial pecuniary interests in and economic arrangements with said The Union Properties, Inc., and its predecessors in title.

On the day of December, 1941, said Court

of Appeals issued an order to take depositions of sundry witnesses.

That said depositions were subsequently duly taken and that on the 2nd day of March, 1942, said cause came on for hearing before said Court of Appeals and said depositions were presented and delivered to said Court, the pertinent part of which appears in Defendant's Exhibit Z and attached to the within petition and made a part hereof.

On said 2nd day of March, 1942, in said Court of Appeals at the hearing of said pending cause one John Crowl, a qualified court reporter, took shorthand notes of said proceedings. A pertinent part of said proceedings, as appears from transcription of said shorthand notes, discloses that two of the Judges of said Court of Appeals had substantial pecuniary interests in The Union Properties, Inc., and its predecessors in title, on the aforesaid 17th day of March, 1938, when said Court of Appeals rendered said Judgment and decree in foreclosure and on aforesaid 10th day of MARCH 1939, when said Court of Appeals confirmed said Sheriff's sale to said The Union Properties, Inc.

Said Court of Appeals rendered Judgment against your Petitioner and dismissed his petition to vacate said sale and said confirmation of sale and dismissed his supplemental petition to vacate and set aside said decree of foreclosure and made an entry of said Judgment in the court journal on the 16th day of March, 1942. Said Judgment is embodied in the following words:

> "Prayer of petition and supplemental petition for vacation of judgment denied. Exceptions noted. Petitions are dismissed. Exceptions noted."—*Journal 14, 473.*

Thereafter on the 3rd day of April, 1942, your Peti-

tioner filed with said Court of Appeals and with the Supreme Court of Ohio a Notice of Appeal as of Right to the Supreme Court of Ohio, from said Judgment, in accordance with the rules and law of Ohio Appellate procedure, and subsequently filed a Motion to Certify.

On the 3rd day of June, 1942, the Supreme Court of Ohio rendered final Judgment in said cause and overruled said Motion to Certify and denied to your Petitioner the Appeal of Right and entered said Judgment on the 3rd day of June, 1942, in the following language:

> "Motion for an order directing the Court of Appeals to Certify its Record. It is ordered by the Court that this motion be, and the same hereby is overruled. Appeal of Right dismissed for the reason no debatable constitutional question is involved in said cause."—*Journal 14, page 605*

Your Petitioner contended in his Briefs filed in said Court of Appeals, the Court of first instance, that, in the prior actions he had been deprived of property without due process of law contrary to Amendment XIV, Section 1 of the Constitution of the United States, and alleged the same in his pleadings filed in said Court of Appeals, and your Petitioner made the same contention before the Supreme Court of Ohio.

WHEREFORE your Petitioner respectfully prays that a Writ of Certiorari be issued by this Honorable Court to command the Supreme Court of Ohio to certify and to send to this Court for review and determination a transcript of the record in case numbered 29,145 on its Docket and a transcript of the record and proceedings in case numbered 16655 on the Docket of said Court of Appeals and that the Judgment of the Supreme Court of Ohio may be reversed by this Honorable Court, and that an Order may be issued directing the Supreme Court of Ohio to grant to your Petitioner a hearing on MERIT.

BRIEF SUPPORTING PETITION FOR WRIT

Robert W. Halliday, sole heir-at-law of Janet M. Halliday, deceased, submits the following brief to support his Petition for a Writ filed herewith in the above entitled case.

The pending case was originally commenced by the petitioner in the Court of Appeals, 8th Judicial District of Ohio, by filing a petition to vacate an order of said Court of Appeals confirming the sale of real property by the Sheriff of Cuyahoga County, Ohio, to The Union Properties, Inc., the plaintiff in foreclosure case No. 166577, on the grounds that there was irregularity in the obtaining of said order in that the appraisers were not disinterested and were not freeholders of Cuyahoga County, and that said purported appraisers did not return an estimate of the real value of the property in money but did return an estimate of value of said property far below its real value in money, and that there was not an appraisement of the property as required by the Laws of the State of Ohio. Specifically Section 11672 of the General Code of Ohio provides:

> "11672. Lands to be appraised.—When execution is levied upon lands and tenements, the officer who makes the levy shall call an inquest of three disinterested freeholders, residents of the county where the lands taken in execution are situated, and administer to them an oath impartially to appraise the property so levied upon, upon actual view. They forthwith shall return to such officer, under their hands, an estimate of the real value of the property in money."

Defendant's Exhibit 1 (R) is a photostatic copy of the return of the appraisers in case No. 16657 and shows that Wm. C. Reed, Robert F. Mooney, and Wm. G. Manoney acted as appraisers of said described premises.

The attorneys for the litigants stipulated as follows:

It is stipulated that the County Recorder if called to testify, would testify that the records of Cuyahoga County, Ohio, disclose that the appraisers William G. Mahoney, Robert F. Mooney, and William C. Reed were not the owners of title record to any real estate in Cuyahoga County in the years 1937, 1938, and 1939.

The testimony of Mark Swisher (R-) shows that the return of the appraisers was not an estimate of the real value of the property in money.

The testimony of Peter V. Shepherd (R-) shows that the return of the appraisers was not an estimate of the real value in money.

Said Petitioner also filed in said Court of Appeals in the pending case a Supplemental Petition to vacate the decree of foreclosure and the order to appraise, advertise and sell the premises, rendered on the 17th day of March, 1938, on the ground that one of the Judges of said Court of Appeals had substantial pecuniary interest in and economic arrangements with The Union Properties, Inc., and its predecessor and at the hearing of said case before the said Court of Appeals on March 2, 1942, it was disclosed that two of the Judges of said Court of Appeals had substantial pecuniary interests in The Union Properties, Inc. To substantiate the above, reference is made to the court reporter's notes taken in Court of Appeals, at the hearing of the pending cause on said March 2, 1942, to-wit:

Mr. Bravo: So much for the appraisers—except that I want to comment upon Thos. Terrell. He is a brother of former Judge Terrell, who sat on this bench.

He stated in his deposition that he did not know whether any members of his family were financially interested in The Union Trust Co. or its successors. Well, the records of that bank, I think, will disclose that the sisters of Judge and Thos. Terrell are holders of creditor's notes against the Union Properties, Inc., in some Three Thousand Dollars or better and Judge Terrell heavily interested.

Judge Lieghley: So you have not overlooked anything—

Mr. Bravo: Well, we want time to take their depositions.

Judge Lieghley: I am a depositor in that bank; so I do not want you to overlook that.

Mr. Bravo: Well, your Honor, I think that revelation comes at a rather late time.

Judge Lieghley: If that is disqualification, neither of the banks could probably get a case tried in Cuyahoga County.

Mr. Bravo: Well, they can always bring a Judge from outside the county unless your Honor revealed his interest by reason of the deposit, and there was an agreement that your Honor sit in this matter.

Judge Lieghley: Just simply a depositor. When they closed the bank I did get my money, a few cents.

Mr. Bravo: Your Honor, for the record I desire to show that Robert W. Halliday objects to your Honor sitting in this case, by reason of the fact that you have just disclosed that you were a depositor in the Union Trust Company an as a holder of creditor's notes in Union Properties, Inc.

Judge Lieghley: Let the record so show. I think I have something around $400 coming yet. Show that, too.

Mr. Bravo: Subject to same objection.

If a Judge has pecuniary interests in the result of the judgment which he renders, such judgment is invalid.

In the case of *Gregory vs. C. C. C. R. R. Co.,* 4 O. S. 675, it was held:

> "Where two judges of the Court of Common Pleas are interested in the event of a proceeding to appropriate land to the use of a railroad and that fact appears of record, and there is no evidence that the land-holder waived his objections to the court, the order of the court, appointing appraisers and directing a warrant, will be revised."

Here Judges were stockholders of the railroad. The appraisers appointed by the court set the value of the land taken and benefited thereby.

In the case of *Tumey vs. State of Ohio,* 273 U. S. Rep. 510-11, the United States Supreme Court held that the interest of a mayor in the result of his decision resulted in an invalid judgment.

In the Tari case, 117 O. S. at page 486, Chief Justice Marshall says:

> "While a State can fix, determine and define the jurisdiction of its courts, it is still open to the United States Supreme Court to determine whether a jurisdiction so exercised operates as a denial of due process of law."

Violation of the due process clause of Amendment XIV of the Constitution of the United States was alleged in the petition originally filed in said Court of Appeals by the petitioner.

Section 6 of Art. IV of the Ohio State Constitution provides that the judgments of the Court of Appeals of the State of Ohio shall be final in all cases, except cases involving questions arising under the Constitution of the United States or of the State of Ohio, and except in cases of which a *Court of Appeals* of Ohio has *Original Jurisdiction.*

In the pending case the petition to vacate the prior action of the Court of Appeals was filed in the Court of Appeals. Original Jurisdiction was assumed by said Court of Appeals. No contention against such *Original Jurisdiction* has been made.

The proir Action of the said Court of Appeals which the Petitioner seeks to vacate consist of

1. A decree in foreclosure and orders to appraise, advertise and sell the described premises rendered on March 17, 1938 by said Court of Appeals;

2. The sale of said described premises by the sheriff of Cuyahoga County pursuant to said orders of March 17, 1938;

3. The order of confirmation of sale by said Court of Appeals issued MARCH 13TH, 1939.

The Supreme Court of Ohio ignored the provisions of Art. IV, Section 6 of the Ohio State Constitution, and denied to your Petitioner the right to a hearing on the merits of the case and affirmed the judgment of said Court of Appeals without a hearing on merit in violation of said Art. IV, Section 6 of the Ohio State Constitution, and in violation of Amendment XIV, Section 1, of the United States Constitution.

JAMES BRAVO, WM. T. ARNOS, R. W. HALLIDAY,
Attorneys for Petitioner,
1245 Leader Building,
Cleveland, Ohio.

STATE OF OHIO,
CUYAHOGA COUNTY, } ss:

ROBERT W. HALLIDAY, being first duly sworn, says: I am the foregoing Petitioner, and that the foregoing Petition is true to my own knowledge.

_____

SWORN to before me this ..... day of August, 1942.

_____

Notary Public.

Office - Supreme Court, U. S.
FILED
OCT 30 1942
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM 1942.

Nos. 437, 438, 439.

ROBERT W. HALLIDAY,
Petitioner,

vs.

UNION PROPERTIES, INC.,
Respondent.

ON PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF OHIO.

MEMORANDUM FOR RESPONDENT, UNION PROPERTIES, INC.

EDWIN H. CHANEY,
Union Commerce Building,
Cleveland, Ohio,
Counsel for Respondent,
Union Properties, Inc.

SQUIRE, SANDERS & DEMPSEY,
Union Commerce Building,
Cleveland, Ohio,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 5647

INDEX.

Statement 1

Argument 5

Conclusion 9

Appendix: Statutes, Rules and Constitutional Provisions 10

AUTHORITIES CITED.

Cases.

Diebold v. Powell, 32 O. S. 173 (1877)..... 7

Estate of Marion Tyler, In re, 140 O. S. 333 (1942).... 1

Franklin v. South Carolina, 218 U. S. 161 (1910)..... 7

Lynch v. New York ex rel. Pierson, 293 U. S. 52 (1934) 6

Matthews v. Huwe, 269 U. S. 262 (1925)..... 5

McMasters v. Gould, 276 U. S. 284 (1928)..... 5

Norton v. Norton, 111 O. S. 262 (1924)..... 6

Southern Electric Co. v. Stoddard, 269 U. S. 186 (1925) 5

Standard Oil Co. v. Missouri, 224 U. S. 270 (1912).... 6

Tenesy v. City of Cleveland, 133 O. S. 251 (1938).... 1

Tumey v. Ohio, 273 U. S. 510 (1927)..... 7

Constitution of Ohio.

Article IV, Section 2 .....4, 5, 10

Article IV, Section 6 .....7, 11

General Code of Ohio.

Section 1527 .....3, 7, 11

Section 11564 .....1, 10

Section 11566 .....1, 10

Section 11631(3) 8, 12
Section 11637 ..... 8, 12
Section 11640 ..... 8, 12
Section 11672 ..... 2, 6, 11

Rules of Practice of the Supreme Court of Ohio.

Rule II, Section 1 ..... 4, 5, 6, 10

In the Supreme Court of the United States

OCTOBER TERM 1942.

Nos. 437, 438, 439.

ROBERT W. HALLIDAY,
Petitioner,
vs.
UNION PROPERTIES, INC.,
Respondent.

ON PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF OHIO.

MEMORANDUM FOR RESPONDENT, UNION PROPERTIES, INC.

STATEMENT.[1]

Prior to her death on January 2, 1929, Janet Halliday, mother of petitioner, executed separate mortgages to The Union Trust Company, Cleveland, Ohio, of the properties

[1] Under Ohio practice testimony, exhibits and proceedings in the trial court can become a part of the record only through the filing of a bill of exceptions within the jurisdictional period specified in Section 11564 of the General Code of Ohio (Appendix, p. 10) and the correction, allowance and signing thereof by the trial court as provided in Section 11566 (Appendix, p. 10). In the absence of such a bill of exceptions, the only errors before the reviewing court are errors of law disclosed by the pleadings and orders or judgments in the cause. *Tenesy v. City of Cleveland*, 133 O. S. 251 (1938); *In re Estate of Marion Tyler*, 140 O. S. 333 (1942). Petitioner did not file bills of exceptions within the statutory period and therefore the depositions, exhibits and unauthenticated transcript of proceedings in the Court of Appeals of Cuyahoga County, Ohio, are not and cannot be made a part of its record in these cases. For the purpose of this memorandum, however, the depositions, exhibits and reporters' minutes of part of the proceedings in the Court of Appeals are treated as though they were part of the records in these cases.

described in the petitions for certiorari. On October 2, 1934, the Superintendent of Banks of Ohio brought actions in the Court of Common Pleas of Cuyahoga County on behalf of the Trust Company to foreclose these mortgages. From judgments for the Superintendent, petitioner appealed to the Court of Appeals where he obtained a trial *de novo*. The Court of Appeals entered decrees of foreclosure on March 17, 1938, which adjudicated among other things that title to the properties was in the administrator of the estate of Janet Halliday and that petitioner had no right, title or interest in them. Appraisers were appointed by the sheriff, appraisals were returned, and sales were held at which respondent, successor in interest to The Union Trust Company, was the successful bidder. Respondent filed motions to confirm the sales, and after a hearing the Court of Appeals confirmed two of the sales on January 10, 1939, and the other on March 13, 1939. Subsequently, the properties were conveyed to respondent.

In June, 1941, almost two years after the end of the term at which the orders confirming the sales had been entered, petitioner filed petitions in the Court of Appeals to vacate them. Basis of the positions was his claim that some of the appraisers were not disinterested or freeholders, and did not return an estimate of the real value of the properties, all as required by Section 11672 of the General Code of Ohio (Appendix, p. 11). On February 27, 1941, petitioner filed supplemental petitions seeking vacation of the foreclosure decrees as well as the orders confirming the sales on the ground that Judge Virgil J. Terrell, formerly a member of the court and one of the three judges who concurred in the decrees and orders confirming the sales, was a depositor in The Union Trust Company, the mortgagee, and thus was interested in the outcome of the foreclosure actions. Respondent's answers admitted immaterial allegations, denied the balance, and as affirmative defenses pleaded that petitioner was not a proper

party to maintain the actions and that a prior decree quieting title in respondent was *res adjudicata.*

A hearing was held in the Court of Appeals on March 2, 1942. Petitioner asserted that Judge Terrell and certain members of his family had been depositors in The Union Trust Company and that he wanted time to take their depositions. This request was refused. Petitioner did not offer any evidence concerning the alleged interest of Judge Terrell.

At this point in the hearing Judge P. L. A. Lieghley, one of three judges hearing the case, disclosed that he had been a depositor in The Union Trust Company. Petitioner's counsel then stated that he wanted the record to show that petitioner objected to Judge Lieghley participating in the case. Neither then nor later did petitioner, who is an attorney, or his counsel, file an affidavit of bias and prejudice as provided in Section 1527 of the General Code of Ohio (Appendix, p. 11) or request time to file such an affidavit. No application was made either then or later for leave to amend the pleadings in order to assert the interest of Judge Lieghley at the time of the earlier hearings as a ground for vacating the foreclosure decrees or orders confirming the sales.

On March 16, 1942, the Court of Appeals entered an order dismissing the petitions and supplemental petitions. The court did not write an opinion. Petitioner filed notices of appeal to the Supreme Court of Ohio, which sought to invoke its jurisdiction on two grounds: (1) that the cases involved constitutional questions; and (2) that the cases were of public and great general interest. To sustain the second ground, petitioner filed motions for orders requiring the Court of Appeals to certify its records. The notices of appeal did not seek to invoke the jurisdiction of the Supreme Court on the ground that the cases originated in the Court of Appeals.

In his motions for orders requiring the Court of Appeals to certify its records, petitioner assigned several errors. The fourth assignment alleged in general terms that petitioner was deprived of his property without due process of law in violation of the Constitutions of Ohio and the United States. This assignment did not specify whether the orders of the Court of Appeals constituted a denial of due process by reason of the alleged disqualification of the appraisers, the alleged interest of Judge Terrell or the refusal of the court to grant a continuance to permit petitioner to take depositions concerning it, or the participation of Judge Lieghley in the hearing after his disclosure that he had been a depositor in The Union Trust Company. The motions to certify were the first pleadings in which petitioner asserted the alleged denial of due process. On June 3, 1942, the Supreme Court of Ohio entered orders overruling the motions to certify and dismissing the appeals. The latter orders stated that the appeals were "dismissed, *sua sponte* (no debatable constitutional questions involved)". The court did not write an opinion.

Petitioner filed applications for rehearing which asserted that the cases had originated in the Court of Appeals and that the Supreme Court of Ohio was therefore required by Article IV, Section 2 of the Constitution of Ohio (Appendix, p. 10) to assume jurisdiction. Respondent conceded that the cases had originated in the Court of Appeals but opposed the applications because the notices of appeals had not specified that petitioner invoked jurisdiction of the Supreme Court on this ground, as required by Rule II, Section 1 of the Rules of Practice of the Supreme Court of Ohio (Appendix, p. 10). The applications were denied on July 1, 1942.

ARGUMENT.

I.

The petitions for writs of certiorari should be denied because petitioner did not exhaust his remedies for review by the Supreme Court of Ohio. *Matthews v. Huwe*, 269 U. S. 262 (1925); *McMasters v. Gould*, 276 U. S. 284 (1928); *Southern Electric Co. v. Stoddard*, 269 U. S. 186 (1925).

Article IV, Section 2 of the Constitution of Ohio (Appendix, p. 10) afforded petitioner three modes of invoking the jurisdiction of the Supreme Court of Ohio: (1) by motions for orders requiring the Court of Appeals to certify its records on the ground that the cases were of public and great general interest; (2) by appeals of right on the ground that the cases involved constitutional questions; and (3) by appeals of right on the ground that the cases originated in the Court of Appeals. The first mode of appeal is addressed to the discretion of the court. The second mode of appeal involves a preliminary hearing, as to the debatability of the constitutional questions, prior to a full hearing of all questions in the case. The third mode of appeal involves a full hearing of all questions in the case without a preliminary determination that the case is of public or great general interest or involves constitutional questions.

Rule II, Section 1 of the Rules of Practice of the Supreme Court of Ohio required the petitioner to state expressly in his notices of appeals the mode or modes of invoking the jurisdiction on which he relied. The notices of appeals specified the first two modes of invoking jurisdiction but did not specify the third. Petitioner states (Petitions, p. 10) and no one disputes that the cases originated in the Court of Appeals within the meaning of Article IV, Section 2 of the Constitution of Ohio. Petitioner invoked the jurisdiction of the Supreme Court on this ground for the first time in his applications for rehearings. Respondent did not deny that the cases originated in the Court of Appeals, but denied that petitioner had in-

voked jurisdiction on this ground within the time and in the manner required by Rule II, Section 1. Denial of the applications for rehearing sustained the position of respondent. It follows that the petitions for writs of certiorari should be denied because petitioner did not exhaust his remedies for review by the state court.

II.

The claims that some of the appraisers were not disinterested, were not freeholders of the county and did not actually view the properties involve questions of local law —the proper construction of Section 11672 of the General Code of Ohio. The same is true of petitioner's contention that the Supreme Court of Ohio misconstrued Article IV, Section 6 of the Constitution of Ohio relating to jurisdiction in cases originating in courts of appeals. *Standard Oil Co. v. Missouri,* 224 U. S. 270, 281 (1912).

III.

The orders entered by the Court of Appeals and by the Supreme Court of Ohio are silent as to the bases of the courts' judgments. There is nothing to indicate that the Supreme Court ruled or intended to rule upon the claim of petitioner that the judgments of the Court of Appeals deprived him of due process in violation of the Fourteenth Amendment to the Constitution of the United States. See *Lynch v. New York ex rel. Pierson,* 293 U. S. 52 (1934). There are several adequate and independent non-federal grounds for the judgments of the Supreme Court with respect to the alleged interest of Judge Terrell and Judge Lieghley.

The allegation that Judge Terrell had a substantial interest was denied in respondent's answer and presented a question of fact concerning which petitioner did not offer any evidence. His request at the hearing for a continuance to take depositions was necessarily addressed to the discretion of the Court of Appeals. *Norton v. Norton,* 111

O. S. 262, 266 (1924); *Diebold v. Powell,* 32 O. S. 173, 175 (1877); see *Franklin v. South Carolina,* 218 U. S. 161, 169 (1910). Its ruling refusing the request was unquestionably correct. The cases had been specially assigned for hearing, and at least two months before the hearing petitioner had interrogated the witness, Thomas L. Terrell, concerning the alleged interest of Judge Terrell. (No. 437, Depositions, pp. 1, 16.) In addition, the facts concerning the claims of depositors of The Union Trust Company had been on file in the liquidation proceedings for almost nine years.

The claim based on the fact that Judge Lieghley, who concurred with Judge Skeel and Judge Morgan in the judgments in these cases, had been a depositor in The Union Trust Company, was also properly determined on nonfederal grounds. Petitioner never moved to amend his supplemental petitions to assert the existence of Judge Lieghley's status as a depositor in the Trust Company at the time of the earlier hearings as a ground for vacating the foreclosure decrees and orders confirming the sales. He never invoked or attempted to invoke the procedure provided in Section 1527 (Appendix, p. 11) of the General Code of Ohio and prescribed in Article IV, Section 6 of the Constitution of Ohio (Appendix, p. 11) for determining the alleged disqualification of judges of courts of appeals. Furthermore, there is nothing in the record to show that the asserted interest of Judge Lieghley was direct and substantial.[2] *Tumey v. Ohio,* 273 U. S. 510, 523 (1927).

---

[2] Petitioner has not seen fit to file in this Court one of his own exhibits which would demonstrate that, conceding the extravagant and contradicted claims of petitioner as to the values of the properties, the maximum interest of Judge Lieghley could not conceivably have amounted to the sum of Five Dollars. The ratio of his deposit to the total liabilities of The Union Trust Company and the profit ultimately derived from the sale of the properties might materially reduce his interest. The depositions disclose that all of the properties would have been transferred to purchasers without substantial profit but for the institution of the quiet title actions and the proceedings to vacate the orders confirming the sales.

IV.

In addition to the grounds stated above, there are at least four other non-federal grounds adequate to support the judgments of the court below. The proceedings to vacate the judgments and orders after term were filed under favor of Section 11631(3) of the General Code of Ohio (Appendix, p. 12) and were required by Section 11640 (Appendix, p. 12) to be commenced within three years after the judgments were rendered and the orders were made. The foreclosure decrees were rendered on March 17, 1938 and the proceedings to attack them were not commenced until June, 1941. Moreover, Section 11637 (Appendix, p. 12) explicitly prohibited vacation of the foreclosure decrees and orders confirming the sales unless it was adjudged that petitioner had a valid defense to the foreclosure actions and the motions to confirm the sales. Petitioner did not plead or offer evidence of any defense, real or imaginary, to the foreclosure actions. The depositions which he has filed in this Court contained conflicting evidence from which the state courts could properly have concluded that petitioner had no defense to the motions to confirm the sales.

Respondent specially pleaded that petitioner was not a proper party to maintain the proceedings to vacate. In support of its plea respondent introduced in evidence in the Court of Appeals certified copies of the decrees of foreclosure in which the court had adjudicated that title to the properties was vested in the administrator of the estate of Janet Halliday and that petitioner had no right, title or interest in them. Respondent also specially pleaded that the decree in an action to quiet title was *res adjudicata* of the issues involved in the proceedings to vacate. In support of this plea, respondent introduced in evidence a certified transcript of the pleadings and the judgment of the Court of Common Pleas, which had been affirmed on appeal and had been entered after the orders confirming

the sales in the foreclosure actions. This judgment had quieted title of respondent in the properties against petitioner. Petitioner has not filed these exhibits in this Court and for the reasons stated in footnote 1 above they are not and cannot be made a part of the record in these cases. The fact remains, however, that the special pleas and the evidence supporting them constituted additional non-federal grounds adequate to support the judgments of the court below.

CONCLUSION.

Accordingly, the petitions for writs of certiorari should be denied.

Respectfully submitted,

EDWIN H. CHANEY,
Counsel for Respondent,
Union Properties, Inc.

SQUIRE, SANDERS & DEMPSEY,
Of Counsel.

APPENDIX.

Sec. 11564, Page, Ohio General Code:

> ". . . the party excepting must reduce his objections to writing, and file them in the cause, not later than forty (40) days after the overruling of the motion for a new trial, or the decision of the court, when the motion for a new trial is not filed. . . . And provided further that where a motion is filed in the Supreme Court for an order compelling the Court of Appeals to certify its record or when error proceedings as of right are instituted and a motion is filed to dismiss the error proceedings, the bill of exceptions shall be filed in the Court of Appeals, not later than twenty days from allowing such motion to certify, or overruling the motion to dismiss the error proceedings as of right."

Sec. 11566, Page, Ohio General Code:

> "The trial judge or judges, upon the receipt of the bill shall indorse thereon the date it was received, and within five days thereafter correct it, if necessary, allow and sign such bill, and immediately transmit or cause it to be transmitted to the office of the clerk from whom it was received, with any amendment or objections thereto."

Art. IV, Sec. 2, Constitution of Ohio:

> "The Supreme Court shall . . . have . . . appellate jurisdiction in all cases involving questions arising under the constitution of the United States or of this state . . . and in cases which originated in the courts of appeals. . . . In cases of public or great general interest the Supreme Court may, within such limitation of time as may be prescribed by law, direct any Court of Appeals to certify its record to the Supreme Court, and may review, and affirm, modify or reverse the judgment of the Court of Appeals. . . ."

Rule II, Sec. 1, Rules of Practice of the Supreme Court of Ohio:

> "In all appeals to this Court from the judgment of a Court of Appeals the appellant shall . . . state

in his notice of appeal, filed in the Court of Appeals, whether the appeal is taken to this Court:

(a) in a case involving a constitutional question,

(b) in a case originating in the Court of Appeals,

(c) on condition that a motion to certify be allowed by this Court. . . ."

Sec. 1527, Page, Ohio General Code:

"On the filing of an affidavit of a party to such cause or matter or of his or her counsel, setting forth the fact of such interest, bias, prejudice, or disqualification, the clerk of the Court of Appeals wherein such cause is pending shall forthwith enter the fact of the filing of such affidavit on the trial docket of such court, and forthwith notify the chief justice of the Supreme Court, who shall hear and determine the fact of such disqualification and if found to be disqualified shall forthwith make an order transferring, for the time being, the judge named in such affidavit to another district in exchange for a judge of such other district who is qualified to sit in the trial or hearing of such cause or matter, and designate and appoint such judge from such other district to take the place of the judge so disqualified, in the hearing of any such cause or matter where the same is pending. The order therefor shall be entered upon the journal of such court and the judge designated to take the place of the judge disqualified shall proceed to perform the duties so assigned him. The judge disqualified shall not sit in the trial or hearing of such cause or matter."

Article IV, Sec. 6, Constitution of Ohio:

". . . The chief justice of the Supreme Court of the state shall determine the disability or disqualification of any judge of the Courts of Appeals and he may assign any judge of the Courts of Appeals to any county to hold court."

Sec. 11672, Page, Ohio General Code:

"When execution is levied upon lands and tenements, the officer who makes the levy shall call an in-

quest of three disinterested freeholders, residents of the county where the lands taken in execution are situated, and administer to them an oath impartially to appraise the property so levied upon, upon actual view. They forthwith shall return to such officer, under their hands, an estimate of the real value of the property in money."

Sec. 11631, Page, Ohio General Code:

"The . . . Court of Appeals may vacate or modify its own judgment or order, after the term at which it was made: . . .

3. For mistake, neglect or omission of the clerk, or irregularity in obtaining a judgment or order. . . ."

Section 11637, Page, Ohio General Code:

"A judgment shall not be vacated on motion or petition until it is adjudged that there is a valid defense to the action in which the judgment was rendered; or, if the plaintiff seeks its vacation, that there is a valid cause of action. . . ."

Section 11640:

". . . Proceedings for the causes mentioned in divisions three and six of [section 11631] . . . must be commenced within three years. . . ."